Supreme Court, U.S.
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IN THE
Supreme Court of the United States

CAROL RINEHART

Petitioner,

v.

DAVID SCHMIDT, GUARDIAN
Respondent,

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR MONTGOMERY COUNTY OHIO

PETITION FOR A WRIT OF CERTIORARI

Paul D. Gilbert
Counsel of Record
120 W. Second Street, #503
Dayton, OH 45402
937-224-7311

QUESTIONS PRESENTED

1. Whether an adult incompetent for whom a guardian of the person has been appointed still retains, under the Due Process Clause of the Fourteenth Amendment of the United States Constitution the right to independent representation of Counsel.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
TABLE OF AUTHORITIES	3
OPINIONS BELOW	4
JURISDICTION	4
CONSTITUTIONAL PROVISIONS INVOLVED	4
STATEMENT	4
REASONS FOR GRANTING THE PETITION	6
CONCLUSION	12

TABLE OF AUTHORITIES

Page(s)

Cases:

In Re Gault, 387 U.S. 1 (1967) 8

Guardianship of Lon Hocker, 439 Mass. 709; 791 N.E. 2d 302 (2003) 8, 10

Kent vs. U.S. 383 U.S. 541 (1966) 10

O'Connor v. Donaldson, 422 U.S. 563 (1975) 7

Parham v. J. R., 442 U.S. 584 (1979) 7

In Re Guardianship of Willis, 74 Ohio App 3d554 (1991) 9

Zinerman v. Burch, 494 U.S. 113 (1990) 7

PETITION FOR WRIT OF CERTIORATRI

Other Authorities:

2001 H. H. S. C. Guardianship Advisory Board Report on the Development of Statewide Guardianship System for Texas, December 15, 2001 11

Breggin, Peter, Toxic Psychiatry, 1991 New York: St. Martin's Press and Your Drug May Be Your Problem, Da Capo Press 2000 11

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion and order of both the Court of Appeals of Montgomery County, Ohio and the Probate Court of Montgomery County, Ohio are unreported.

JURISDICTION

The Judgment of the Court of Appeals of Montgomery County, Ohio was entered on December 30, 2004; the Judgment of the Supreme Court of Ohio declining jurisdiction was entered on May 25, 2005; the reconsideration Entry of the Supreme Court of Ohio denying the motion for reconsideration was entered on August 10, 2005. An Order granting an extension of time to file the Petition for Writ of Certiorari was filed on Oct. 27, 2005. This Court has jurisdiction under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution states in relevant part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT

Petitioner, a fifty-nine year old lady, had a history of seizures resulting from Spinal Meningitis at the age of four. The meningitis also caused her to be almost totally deaf. As result of the deafness, here speech was extremely difficult to understand and communication was difficult if not

impossible. Her parents were both deceased and she had no family. She had virtually no friends.

In this state of affairs, she had a seizure; was hospitalized; and for the first time had a psychiatric evaluation. As a result of the evaluation, an application was filed in the Probate Court of Montgomery County, Ohio to have her adjudicated incompetent and to appoint a guardian of her person.

Since an independent psychiatric evaluation found a guardianship necessary, the initial resistance to the guardianship was withdrawn. Therefore, Petitioner was adjudicated incompetent and Respondent was appointed Guardian of her person. Several days later, when Petitioner's Counsel attempted to contact Petitioner, the Guardian refused and has since that time, continuously refused to allow Counsel to see or consult with the Petitioner.

Shortly after Counsel was refused the right to see or consult with Petitioner, Counsel filed on Petitioner's behalf a Motion to See and Consult with Petitioner. That Motion was denied in the trial court and the appellate court affirmed the denial. Questions were raised at the trial level as to the appropriateness of this Counsel representing Petitioner. In fact, Counsel had been representing Petitioner for over ten years; see Magistrate's Hearing of 3/18/03 Tr. 3 and Judge's Hearing of 2/09/04 Tr. 12. Because of the extent of this Counsel's professional relationship with Petitioner and his knowledge of her affairs, the independent psychiatric evaluation showed that the psychiatrist relied, to a great extent, upon information from Counsel in making the evaluation. Furthermore, if there were any question concerning the suitability of this particular Counsel representing Petitioner, that issue should have been put to rest since, in the Hearing before the Trial Judge, Counsel

made it clear he was seeking, in the alternative, the appointment of other Counsel who was independent of the Guardian, see Judge's Hearing of 2/09/04 Tr. 17.

The issue of the Constitutional Right to Counsel was raised throughout these various proceedings starting with the Trial Court, the Appellate Court, and finally in the Supreme Court of Ohio. See, The Decision and Order of the Trial Court at page 2 and The Opinion of the Court of Appeals in the Appendix hereto. Furthermore, this issue was raised in Petitioner's Brief filed in the Court of Appeals as well as in Petitioner's Motion In Support Of Jurisdiction filed in the Ohio Supreme Court.

While stating that they recognized Petitioner's right to independent representation of Counsel, both the Trial Court and the Court of Appeals failed to recognize that right. On the contrary, it was the opinion of these courts that either the Guardian himself, or an attorney selected by the Guardian would sufficiently protect Petitioner's rights. The following statement from the Opinion of the Court of Appeals demonstrates some of the reasoning involved:

> ". . . In sum Gilbert's argument that Rinehart should be allowed to employ an attorney of her own choice based on her current views or of past decisions is inconsistent with the concepts of incompetence and guardianship . . . "

We believe that any such concepts of incompetence and guardianship must give way to the due process right to Counsel as guaranteed by the Fourteenth Amendment to the United States Constitution.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Conflicts, In Principle, With Previous Decisions of This Court.

The question presented raises the issue of whether there is a continuing right to the independent representation of Counsel after an adjudication of incompetency and the appointment of a guardian of the person. Does the Due Process Clause guarantee this right?

In various situations this Court has protected the liberty interest of individuals alleged to be mentally ill as well as the liberty interest of minors. It is hard to imagine a more valued liberty interest than the Right to Counsel. It should be obvious that the Right to Counsel is the foundation of all other rights protected by the liberty interest.

An individual for whom a Guardian of the person has been appointed is virtually in the identical position that a child is in, in his relationship with his parents! He has no freedom of choice and no freedom of movement and is totally under the control of the parent and in this case the Guardian. The most simple and fundamental things that one does in his life cannot be done without the approval of the Guardian. The Ward cannot even decide to take a walk or visit a friend or even decide what clothes to wear if the Guardian should disapprove. Because of the profound invasion of the Ward's civil rights and civil liberties it should be obvious that basic constitutional guarantees must be provided. Of all the basic constitutional guarantees, it is hard to imagine one that is more fundamental than the right of the Ward to an independent selection and choice of Counsel. This Court has ruled that individuals subjected to probate Commitment Proceedings are entitled to due process protection. In Parham v. J. R. 442 U.S. 584 (1979) this

Court ruled that a juvenile who had been committed, was entitled to periodic review of the necessity for his continued commitment. Because of the profound impact of an adjudication of incompetence and the appointment of a guardian of the person, we maintain that the need for due process protection are at least as great here as in the commitment situation. In Zinermon v. Burch, 494 U.S. 113 (1990) this Court ruled that one who had been a voluntary mental patient could maintain a section 1983 action against the hospital staff for failing to ensure either informed consent (upon admission) or provide, in the alternative, an involuntary judicial commitment proceeding. In O'Connor v. Donaldson, 422 U.S. 563 (1975) this Court ruled that a mental patient who had been confined for fifteen years, could maintain a Section 1983 action against hospital staff when the patient was non-dangerous and capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends. As the Court stated in Zinermon at page 131

> ". . . . Petitioners do not seriously dispute that there is a substantial liberty interest in avoiding confinement in a mental hospital." See Vitek v. Jones, 445 U.S. 480, 491-492 (1980) (commitment to Mental Hospital entails, "a massive curtailment of liberty," and requires due process protection); Parham v. J. R., 442 U.S., at 600 (there is a "substantial liberty interest in not being confined unnecessarily for medical treatment"); Addington v. Texas, 441 U.S. 418, 425 [***118] (1979) ("HN12 Civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection");

If a mental patient's liberty interest under the due process clause entitles him to these protections, then in principle, at

least as much protection should be provided to one who has been adjudicated incompetent and placed under the guardianship of his person.

Similarly, this Court in In re. Gault 387 U.S. 1 (1967) and Kent v. U.S. 383 U.S. 541 (1966), this Court has protected the rights of juveniles where it was claimed that juvenile court procedures invalidated liberty interests under the Due Process Clause. These juvenile court cases are of particular interest since the rationale for the juvenile procedures is the doctrine of *ParensPatriae*. Traditionally, the same rationale has motivated probate court guardianship procedures. If Due Process rights must be recognized for juveniles in the juvenile court system, why should they not also be recognized here?

For an indefinite period of time into the future and possibly for the rest of her life, this Petitioner, as well as others like her, will have their freedom profoundly curtailed without any opportunity on their own, to question, challenge or otherwise review the reasonableness of their status. Furthermore, over and above questioning their status, they are unable to assert any of the rights (independent of the question of their status). e.g., the right to sue for personal injury, property damage, etc., etc. Ohio courts have held that they cannot even question the propriety of being forcibly medicated since the guardian has absolute power in that area, In Re. Guardianship of Willis, 74 Ohio App 3d 544 (1991).

II. The Question Presented Is Of Exceptional Importance And Requires This Court's Intervention.

The appointments of guardians for adult incompetents are becoming increasingly prevalent, see 2001 H.H.S.C.

Guardianship Advisory Board Report in the Development of Statewide Guardianship System for Texas, Dec. 15, 2001. Furthermore, courts continue to fail to recognize the right to counsel after adjudication, Cf. *Guardianshsip of Lon Hocker*, 439 Mass. 709; 791 N.E.2d 302 (2003).

The language used by the Trial Court and the Appellate Court below belie the fact that probate courts assume that with the appointment of a guardian of the person a ward has no remaining civil rights and civil liberties and his life is totally at the mercy of the guardian. Such a situation presents a various serious problem and a problem of national importance when the ruling is contrasted with this court's precedents relating to mentally ill individuals and juveniles. For all practical purposes, the effect of an adjudication of incompetency and an appointment of a guardian of the person is to "throw away the keys" on the incompetent, for the rest his life. In fact, the effect is worse than imprisoning a criminal for life, because even one in prison for life has access to Counsel to pursue not only questions concerning his continued incarceration but questions concerning numerous other matters which in various ways affect his legal rights, e.g., the Right to Sue custodians for improper treatment, the Right to Sue physicians for malpractice, the Right to Sue the state for unsanitary conditions at a prison, etc., etc. If the rulings below are correct, incompetent wards such as Petitioner's have no right to counsel whatsoever. Even their right to be restored to competency and to seek a termination of their guardianship is rendered meaningless since they are completely at the whim and comprice of the guardian in all matters. Suppose the guardian become dysfunctional or becomes negligent or harsh or abusive. Certainly we cannot say that the guardian can decide when counsel is needed because a guardian engaging in misconduct is hardly likely to ask that an attorney be employed to investigate his own misconduct. An adjudication of incompetence and the

appointment of a guardian of the person does not by some magical incantation protect incompetent wards from all species of harm that may befall them.

Nor is it reasonable to say that since no specific injury can be documented no intervention is justified and no problem of national importance exists. Obviously, as long as courts can cut off access to counsel, no one will ever know whether and when incompetent wards are being injured. A guardian is not a czar over the life of an incompetent. As Justice Fortes stated in Kent v. U.S. 383 U.S. 541; 86 S. Ct. 1045 at page 1049 of 86 S. Ct.

> . . . The admonition to function in a parental relationship is not an invitation to procedural arbitrariness . . .

III. The Decision Below Is Wrong On The Merits.

The statements made by the lower courts in this matter that, in substance, everyone agrees that Petitioner is entitled to the independent representation of counsel are transparent. Similarly, the idea that the courts will somehow know when the circumstances require counsel is without foundation. Obviously, the court has no independent means of knowing the ward's status and even if there were some independent investigation, that would not replace the protections afforded by independent counsel who's purposes would be to protect the rights of the ward from the ward's point of view. Courts can state, as these lower courts have stated, that one is entitled to the independent representation of counsel, but what possible value can those statements contain when a simple request to see and consult the ward is denied as is a request to have other or different counsel perform the same function.

This particular ward was found to be bipolar (see opinion of the Court of Appeals at page 2) and was on medication (Hearing before the Trial Court TR 16). Without independent counsel, who is available to question, on Petitioner's behalf, the continued need for medication? Psychotropic and neuroleptic drugs are particularly dangerous and some physicians feel they never should be used. See Peter Breggin *Toxic Psychiatry*, 1991 New York: St. Martin's Press and *Your Drug May Be Your Problem*, Da Capo Press, 2000. If the drugs are not dangerous, there is still the question of whether their use is but one more factor adding to Petitioner's incompetence and making her less able to stand up for herself without counsel, See Breggin id. In this case Petitioner has no family and no friends. Is Petitioner doomed to accept for the rest of her life the decision of her guardian about her medication needs and the decision of her guardian regarding the plethora of other instances where she may be injured and her rights infringed?

IV. Conclusion

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Paul D. Gilbert
Counsel of Record
120 W. Second Street, #503
Dayton, OH 45402
(937) 224-7311

2005

APPENDICES

		Page
A.	Supreme Court of Ohio Entry	1
B.	Supreme Court of Ohic Reconsideration Entry	2
C.	Court of Appeals for Montgomery County Ohio Final Entry	3
D.	Court of Appeals for Montgomery County Opinion	5
E.	Probate Court of Montgomery County, Ohio Decision, Order and Entry Adopting Magistrate's Decision	10

THE SUPREME COURT OF OHIO

In re: Guardianship of Carol Rinehart,
An Adult Incompetent Case No.05-295

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

(Montgomery County Court of Appeals; No. 20376)

(Signed)_____
THOMAS J. MOYER
Chief Justice

THE SUPREME COURT OF OHIO

In re: Guardianship of Carol Rinehart,
An Adult Incompetent Case No. 05-295

RECONSIDERATION ENTRY

Montgomery County

IT IS ORDERED by the Court that the motion for reconsideration in this case be, and hereby is, denied.

(Montgomery County Court of Appeals; No. 20376)

(Signed)
THOMAS J. MOYER
Chief Justice

IN THE COURT OF APAPEALS FOR MONTGOMERY COUNTY, OHIO

In re: Guardianship of C.A. Case No. 20376

CAROL RINEHART, T.C. NO. 341082

An Adult Incompetent **FINAL ENTRY**

Pursuant to the opinion of this court rendered on the 30th day of December, 2004, the judgment is affirmed.

Costs to be paid as stated in App. R. 24.

(Signed)_____
WILLIAM H. WOLFF, JR.
Judge

(Signed)_____
THOMAS J. GRADY
Judge

(Signed)_____
FREDERICK N. YOUNG
Judge

Copies mailed to:

Paul D. Gilbert
120 W. Second Street
Suite 503
Dayton, Ohio 45402

David R. Schmidt
1200 East Dorothy Lane
Dayton, Ohio 45419

Hon. Alice O. McCollum
Probate Court
41 N. Perry Street
Dayton, Ohio 45422

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

In Re: Guardianship of	C.A. CASE NO. 20376
CAROL RINEHART	T.C. NO. 341082
An Adult Incompetent	(Civil Appeal from Common Please Court, Probate Division)

OPINION

Rendered on the 30th day of December, 2004.

PAUL D. GILBERT, Atty, Reg. No. 0010129, 120 W. Second Street, Suite 503, Dayton, Ohio 45402
Attorney for Appellant

DAVID R. SCHMIDT, Atty, Reg. No. 0012588, 1200 East Dorothy Lane, Dayton, Ohio 45419
Attorney for Appellee

WOLFF, J

Paul Gilbert appeals from a judgment of the Montgomery County Court of Common Pleas, Probate Division, which refused to direct the guardian of Carol Rinehart to allow him to function as Rinehart's attorney.

Rinehart suffers from bi-polar disorder, deafness, and a number of other debilitating conditions. In January 2003, she was adjudicated incompetent, and David Schmidt was appointed to serve as guardian of her person. In February 2003, Schmidt notified Gilbert, who had had an attorney-client relationship with Rinehart of several years, that his

services on Rinehart's behalf were no longer needed. Gilbert filed a Motion for Order Permitting Counsel to Confer and Consult with Ward and Directing Guardian and Custodian to Cooperate. In March 2003, Schmidt was appointed guardian of Rinehart's estate.

Gilbert's motion was referred to a magistrate, who conducted a hearing and issued a report and recommendation denying the motion. Gilbert filed objections to the magistrate's report and recommendation, and on February 9, 2004, the trial court conducted a second hearing. The trial court then adopted the magistrate's report and recommendation.

Gilbert raises one assignment of error on appeal.

"THE TRIAL COURT COMMITTED ERROR IN NOT SUSTAINING APPELLANT"S MOTION OR, IN THE ALTERNATIVE IN NOT APPOINTING OR AUTHORIZING OTHER COUNSEL TO SEE AND CONSULT WITH APPELLANT."

Gilbert contends that Rinehart had a "right to continue a previous contract entered before guardianship" and a constitutional right to independent legal representation. Gilbert further argues that Rinehart is entitled to her choice of counsel.

The parties do not dispute that Rinehart is entitled to an attorney. Schmidt, who is also an attorney, agrees with Gilbert that "the 14th Amendment to the United States Constitution provides access to independent counsel by an adjudicated incompetent." The parties disagree as to whether Rinehart is entitled to her own choice of counsel, as evidenced by her hiring of Gilbert prior to the finding of incompetency, or whether the guardian is free to hire

someone to handle Rinehart's legal representation. In our view, the law and common sense point to only one result.

R.C. 2111.13© provides:

"A guardian of the person may authorize or approve the provision to the ward of medical, health, or other professional care, counsel, treatment, or services unless the ward or an interested party files objections with the probate court, or the court, by rule or order, provides otherwise."

Legal services clearly fall within the definition of services to be authorized or approved by the guardian. Thus, the selection of an attorney for an incompetent person is within the purview of the guardian. This conclusion is bolstered by R.C. 2111.50(B), which provides that, through the powers conferred by the probate court, the guardian possesses "all the powers that relate to the person and estate of the person and the he [the person] could exercise if present and not a minor or under a disability, except the power to make or revoke a will." The powers include, but are not limited to, the power to enter into contracts. R.C. 2111.50(B)(3).

Gilbert relies on the fact that his legal representation of Rinehart allegedly began before she became incompetent. However, Rinehart was not under any obligation to continue her legal relationship with Gilbert. Schmidt, in his role as guardian, had the authority to hire a different attorney, or no attorney at all, as he saw fit, just as Rinehart could have done if she were competent.

Gilbert also asserts that an ongoing relationship with an attorney is essential to the protection of Rinehart's due process rights. Schmidt counters that there are numerous ways to protect Rinehart's interests, but that the permanent

retention of an attorney is not one of them. Schmidt points out that, if concern arose over the adequacy of his representation of Rinehart's legal rights, the appropriate remedy would be for the concerned party to challenge his guardianship, rather than to attempt to achieve the appointment of an attorney who operated outside the bounds of the guardianship. We agree with this assessment. Moreover, we are un-persuaded by Gilbert's assertion that an attorney should immediately be appointed for Rinehart's protection, even if it not him; it would be speculative for us to conclude that Rinehart needs legal services at this point. The constitutional right to an attorney is not violated if one has no need for an attorney. Furthermore, it appears that Rinehart's due process rights were duly respected in the determination of incompetency and the appointment of the guardian.

The cases upon which Gilbert relies to not support his position. For example, Gilbert relies on Friedrich v. BancOhio National Bank (1984), 14 Ohio App. 3d 247, 470 N.E.2d 467, for the proposition that "[n]othing in Ohio law allows a guardian carte blanche authority to terminate previous contracts of a ward." However, Friedrich dealt with whether a guardian had the authority to terminate an intervivos trust, and its holding relied very much on the law of trusts, which is unique and separate from the law of contracts. Similarly, in Witt v. Ward (1989), 60 Ohio App.3d 21, 573 N.E.2d 201, the court's recognition of limitations on the powers of the guardians was closely tied to the testamentary nature of the joint and survivorship accounts and payable on death accounts that were in dispute, and not on the law of contract. Moreover, Gilbert did not have a preexisting contract with Rinehart for future employment, and it is beyond dispute that an incompetent person cannot enter into contracts. See R.C. 2111.50 (B)(3).

In sum, Gilbert's argument that Rinehart should be allowed to employ an attorney of her choice based on her current views or her past decisions is inconsistent with the concepts of incompetency and guardianship. We conclude that neither nor Rinehart had the right to insist upon Gilbert's continued legal representation of Rinehart, and the trial court was under no obligation immediately to appoint a different attorney for Rinehart. Schmidt has been entrusted with looking after Rinehart's best interests, including her legal interests, and if he fails to do so, other avenues are available through the probate court to remedy that situation.

The assignment of error is overruled.

The judgment of the trial court will be affirmed.

GRADY, J. and YOUNG, J., concur.

Copies mailed to:

Paul D. Gilbert
David R. Schmidt
Hon. Alice O. McCollum

IN THE PROBATE COURT OF MONTGOMERY COUNTY, OHIO

IN THE MATTER OF THE GUARDIANSHIP OF	**CASE NO. 341082 (McCOLLUM, J.)**
CAROL RINEHART, AN ADULT INCOMPETENT	**DECISION, ORDER AND ENTRY ADOPTING MAGISTRATE'S DECISION**

This matter came before the court on Paul Gilbert's objections to the Magistrate's report. The court held a hearing on February 9, 2004. Both parties, David Schmidt and Paul Gilbert, were present and presented their respective arguments.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

On January 14, 2003, David Schmidt was appointed guardian of the person of Carol Rinehart (hereinafter referred to as the ward). At the hearing, Paul Gilbert, allegedly representing the ward, objected to the application but to no avail. The same day, the guardian notified the personnel at Harborside Nursing Home, the ward's residence, of his appointment and his desire to terminate Gilbert's attorney-client relationship with the ward. On February 4, 2003, the guardian mailed a letter to Gilbert terminating his services. Subsequently, on March 4, 2003, David Schmidt was appointed guardian of the ward's estate.

On February 14, 2003 Gilbert objected to his dismissal and filed a Motion to Consult and Confer with the

Ward and Directing Guardian and Custodian to Cooperate. The hearing on his motion was held before the Magistrate on March 18, 2003. Subsequent to the hearing, the parties submitted numerous memoranda. The Magistrate rendered his decision on July 24, 2003 finding that pursuant to R.C.§2111.13©, the guardian possessed the authority to terminate Gilbert's relationship with the ward that was formed before the ward was declared incompetent. Gilbert objects to the Magistrate's findings.

LAW AND ANALYSIS

The Court carefully reviewed the memoranda that he filed before the Magistrate's decision, the Magistrate's decision, the plaintiff's objections to the decision and the transcript of the magistrate's hearing, prior to the Court's hearing on February 9, 2004. Gilbert's major contention is that the guardian does not have the authority to terminate his services, as then the ward would be deprived of her due process right to counsel.

Actually, Mr. Gilbert confuses the issue. The issue is not whether the ward is entitled to independent counsel. All parties agree that should the ward need or desire counsel, the ward would certainly be entitled to counsel. There is no due process or constitutional issue in this case. The Court adopts the Magistrate's decision on this issue.

The only issue is whether the guardian has the authority to remove this particular attorney, Mr. Gilbert. A ward cannot on her own bind her own guardianship estate to obligations bases on contract, unless ratified by the guardian. In *re Guardianship of Allen* (1990). 50 Ohio St. 3d 142,552 N.E.2d 934. Here, the guardian refused to ratify the previous relationship that Gilbert had with the ward. Since the ward has been declared incompetent and a guardian of the estate

and person appointed for her, she cannot contract for legal services.

In the application for the guardianship, the independent evaluator who observed the ward found that the ward was unable to care for her daily needs or her financial affairs, that her house had been condemned and she was in need of dental work. If Gilbert had an attorney-client relationship with the ward since before her parents died, for more than ten years, how did he allow the ward's house to be condemned? How did he allow the wasting of her assets?

Now that the guardian more closely monitors the ward's welfare and financial affairs, the Court finds that it is in the ward's best interest that Gilbert's attorney-client relationship with the ward be terminated. There is no need for duplicative services nor services for which the ward cannot contract. The guardian has the authority to terminate Gilbert's services. The Court **ADOPTS** the magistrate's decision on this issue.

CONCLUSION

Accordingly, the Court finds that Gilbert's objections to the Magistrate's Decision are not well taken. The court, therefore, **ADOPTS** the magistrate's decision.

IT IS SO ORDERED.

(Signed)_____
ALICE O. McCOLLUM,
JUDGE

Case No.: 341082

David R. Schmidt
1200 East Dorothy Lane
Dayton, Ohio 45419

Paul D. Gilbert
120 West Second Street
Suite 503
Dayton, Ohio 45402

Copies sent by ordinary mail to the above named parties on 2-13-04 by _____.

FINAL APPEALABLE ORDER

TO THE CLERK: Please serve a notice of the judgment and its date of entry upon the journal to all parties who are not in default for failure to appear.

(Signed)_____